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MINERAL MINING BUSINESS CONTROL IN THE AREA OF PROTECTED FOREST

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ABSTRACT

The implementation of government based on good governance aims to provide the best service for the community. As stipulated in the 1945 Constitution, Indonesia mandates the right to a good and healthy environment. In its implementation, the central government and regional governments must coordinate with each other to make it happen. This study aims to determine environmental law enforcement efforts that can be applied to tackle and prevent environmental damage to mining businesses in forest areas. This research is a normative legal research using the Statute Approach and Conceptual Approach. However, in practice, with many environmental cases spreading in various regions, supervision is needed in order to achieve and fulfill the rights of every citizen to get a clean and healthy environment, and not cause environmental damage and pollution that impact on the disturbance of the balance of the forest ecosystem and detrimental to the community in the area around the mining area. The need for environmental law enforcement in addition to supervision is also needed, so that mining authorities do not carry out mining activities at will.

BACKGROUND

Mineral natural resources in the form of mining products owned by Indonesia is one of the biggest income commodities for the country, therefore natural resources can be the basic capital of a country's development. High economic investment value can also make natural resources as the main ingredient for the sustainability of human life, ranging from food needs to industry. With the factor of increasing demand for gold production by consumers, many gold mining companies open and expand their mining areas, and not infrequently the opening of mining areas is carried out in forest areas both protected forests and production forests (Rizki et al., 2018).

As recorded according to analysis data from Forest Watch Indonesia (FWI), the average reduction in deforestation rate of 1.13 million hectares per year in the period 2009 - 2013. The multi functionality of forest ecosystems that should be able to make a real contribution to public welfare is in fact only stand on investors that open the mining activities in a forest area (Susan and Budirahayu, 2018).Mining activities in the forest area that have been carried out since the independence era in the early years of the New Order government led to Law Number 11 of 1967 concerning Fundamental Mining Provisions, hereinafter referred to as the Mining Law to regulate mining business permits (Dewar, 2019). The emergence of the Mining Law at that time actually caused a polemic because it was based on an open door policy, in which investors, especially from abroad, would be able to invest in the form of a Contract of Work (CoW). For the government, this significantly benefits state revenues, but this sector also has a negative effect on the environment which will damage the area used as a mining activity which then has an impact on human rights violations (Gabor and Sardjono, 2018).

The exploitation of protected forest areas for mining activities is permitted with a provision that the mining activities use an underground mining pattern rather than an open mining patternin accordance with the provisions in Article 38 paragraph (1) and paragraph (4) of Law Number 41 Year 1999 concerning Forestry hereinafter referred to as the Forestry Law.This statement is affirmed by Presidential Regulation No. 28 of 2011 concerning the Use of Protected Forest Areas for Underground Mining, hereinafter referred to as Perpres on the Use of Protected Forest Areas for Underground Mining in Article 2 section (1), that in protected forest areas mining activities can be carried out by underground mining methods (Purwono et al., 2018).

Based on the information that has been explained, this study aims to find out environmental law enforcement efforts that can be applied to tackle and prevent environmental damage to mining businesses in protected forest areas. The practical implications of this study are expected so that people who experience losses from mining activities can know and understand efforts to protect the law and how environmental law can be applied if there are problems with mineral mining activities so that mining business owners do not carry out mining business activities outside the established procedures and in accordance administrative permit that has been determined in the existing laws and regulations.

RESEARCH METHOD

This research is a normative legal research. This research was arranged using two research methods. First, the Statute Approach is carried out by examining all laws and regulations relating to the legal issues being undertaken. Second, the Conceptual Approach is done by moving from the views and doctrines that develop in the legal studies.In order to find ideas that create notions of law, the concepts related to law and principles of law that are relevant to the legal issues faced. This approach is used to study and analyze the conceptual framework and theoretical framework in accordance with the objectives of this study, namely seeking legal protection to prevent and control mining operations in protected forest areas (Harymawan and Nowland, 2016).

Legal material sources

The primary legal materials used are Government Regulation Number 104 of 2015 concerning Procedures for Changes in the Designation and Function of Forest Areas, and Government Regulation Number 8 of 2018 concerning Fifth Amendment to Government Regulation Number 23 of 2010 concerning Implementation of Mineral and Coal Mining Business Activities.

LITERATURE REVIEW

Regulations on coal mining business in protected forest areas

Utilization and use of forest areas in principle can only be carried out in all forest areas including protected forest areas for mining activities. Only nature reserve forest and the core and jungle zones of national parks are not permitted for the utilization and use of forest areas.One method of mining is the open mining pattern in which the mining method is carried out above or relatively close to the surface of the earth and where the workplace is directly related to free air. (Article 1 number 1 of the Regulation of the Minister of Environment Number 4 of 2012 Concerning Environmental Friendly Indicators for Coal Businesses and / or Open Mining Operations) (McCarthy and Zen, 2010).

Underground mining pattern is mining which activities carried out underground (not directly related to air outside the room) by first making the entrance in the form of a shaft or tunnel or a dead end tunnel (adit) including facilities and infrastructure which supports production activities in protected forests.

Exploitation of mining activities in protected forests must fulfill several obligations and requirements as stipulated in PP Number 24 of 2010 concerning Use of Forest Areas, hereinafter referred to as PP Utilization of Forest Areas and PP (Presidential Regulations) on the Use of Protected Forest Areas for Underground Mining Activities (Sukoco et al., 2018).

Environmental legal instruments in the mineral mining business

Legal arrangements regarding how to care for and protect the environment are needed to support the rights of every citizen to get a good and healthy environment as described in the 1945 Constitution of the Republic of Indonesia and Law No. 32 of 2009 concerning Environmental Protection and Management or referred to as the PPLH Law. In this case, legal instruments for environmental policy (juridische milieubeleidsinstrumenten) are determined by the government through various mediums that are preventive, or at least recovery, to the normal stage of environmental quality (Lin et al., 2019).

The regulation of the rights of citizens to obtain a good and healthy environment is one form of social rights in fundamental rights. As stated by Philipus M Hadjon that natural rights and human rights that are converted into

legal rights are called fundamental rights.[17] Therefore, there is an obligation for the state to fulfill the needs of every citizen for a good and healthy environment as what reads Article 28 H of the 1945 Constitution of the Republic of Indonesia. It should also be remembered that in formulating environmental policies, the government should have set objectives to be achieved so that the environmental policies that have been made can be followed up on directions by how setting goals can be achieved in order to be complied by every element of society.

Government policies in achieving the goal of environmental protection and management as a government action, must be in accordance with the validity of government actions that include authority, substance and procedures (Nasih et al., 2019). In Article 63 Section (1) of the PPLH Law, it is explained that in the protection and management of the environment by the government there are 27 (twenty seven) points of duty and authority that can be carried out, then respectively in Section (2) and Section (3) in the same Article are also explained the duties and authorities of the Provincial Government which amounted to 19 (nineteen) important points and 10 (ten) duties and authorities of the district / city government inin managing the environment and forming environmental legal instruments for handling and preventing environmental pollution and damage (Abood et al., 2015).

Granting the special mining business liscence (IUPK)

Special Mining Business Licenses (IUPK) can only be carried out in the State Reserve Area (WPN) that has been designated as aSpecial Mining Business License Region (WIUPK). IUPK is given by the Minister of Environment to mining business holders by taking into account the interests of the area where the activity is carried out. This is in accordance with Law No. 23 of 2014 concerning Regional Government in which the minister as the official state has the authority to issue the license of mining business with special productionfor the processing and refining of mining commodities from other provinces(Irsan and Utama, 2019).

In WIUPK areas, the mining pattern that can be used in mining activities is the underground mining pattern, not using an open mining pattern. Legally, exploitation of mining activities in protected forest areas can be done if we refer to the Minerba Act, the Forestry Act and the Presidential Regulation on the Use of Protected Forest Areas for Underground Mining Activities. However, land clearing and former mining excavations that use underground mining patterns will still change the function of protected forest areas even though efforts have been made to reclaim the area of former underground mining.

The pattern of underground methods that must build tunnels first and may not be in direct contact with the open environment makes mining entrepreneurs apply for permission to change the status of protected forest areas to production forest areas so that the production produced is more efficient and effective in the mining system.The mechanism for changing the status of forest area has been regulated in Government Regulation Number 104 Year

2015 concerning Procedures for Changing the Purpose and Function of Forest Areas. In the description of Article 37 letter B that changes in the main functions of forest areas include changes in the function of protected forest areas into conservation forests and / or production forests (Wollenberg and Kartodihardjo, 2010).

In addition, in Article 39 letters A and B provide a statement if the change in the function of protected forest areas into conservation forests and / or production forests must be done with the provisions not fulfilling the criteria as protected forest areas in accordance with statutory provisions in terms of being converted into areas production forest, and fulfills the criteria of conservation forest area or production forest in accordance with statutory provisions.

RESULT AND DISCUSSION

Environmental law enforcement facilities

Realizing the rule of law through consistent law enforcement efforts will provide a strong reference basis for the implementation of fair and harmonious legal compliance. In a simple sense, environmental law is defined as the law governing the environmental order that includes objects and natural conditions around. In modern terms, the notion of environmental law is more environmentally oriented or called the Environment Oriented Law and classically emphasizes the orientation of the use of the environment or Use Orientea Law (Rizki et al., 2018).

Enforcement of environmental law in the context of controlling environmental pollution can be distinguished in three aspects: (i) enforcement of administrative environmental law by government officials, (ii) enforcement of criminal environmental law carried out through judicial justice procedures, and (iii) enforcement of civil environmental law and "environmental disputes resolution"pursued by litigation and non-litigation (Niyobuhungiro, 2019).

Gabor and Sardjono in their research stated that environmental law enforcement is an effort to achieve compliance with existing regulations and requirements in general and individual legal provisions. A control that can be done through supervision, and the application and imposition of sanctions that can be in the form of administration, criminal and civil (Gabor and Sardjono, 2018).

Enforcement of environmental law can be carried out in 3 (three) ways, namely the application of sanctions in administrative, criminal justice, and civil. Furthermore, this environmental law enforcement can be carried out in a preventive and repressive manner that is appropriate to its nature and effectiveness (Irsan and Utama, 2019).Preventive law enforcement means that active supervision is carried out on compliance with regulations without direct events involving concrete events that give rise to the suspicion that legal regulations have been violated. There are 3 (three) instruments for preventive law enforcement, namely counseling, monitoring, and the use of supervisory

authority such as sampling at the scene. Thus, the main law enforcers here are officials or government officials who are authorized to give permits and prevent environmental pollution (Di Gregorio, 2012).

The second nature of environmental law enforcement is repressive. This trait is done in the case of acts that violate the rules and aims to directly end the prohibited acts (Niyobuhungiro, 2019). This characteristic is usually immediately given criminal action, because in general criminal action always follows violations of regulations and usually cannot negate the consequences of such violations. Furthermore, regarding the enforcement of civil environmental law by the government, it should be distinguished from efforts to resolve environmental disputes (environmental dispute settlement) that is by way of environmental lawsuits to obtain compensation for victims who experience the effects of pollution due to acts against the law by polluters, because it has an individual nature (Wollenberg and Kartodihardjo, 2010).

The lawsuit referred to here is carried out by the authorities if the administrative environmental law enforcement facilities are inadequate (Abood et al., 2015).

From the three environmental law enforcement, both in criminal and civil administration, the main objective is to impose sanctions on the guilty party in the environmental destruction activity that occurs, not only employers may be subject to sanctions for environmental damage, the government as the licensor of activities or related by granting approval in mining activities, sanctions can also be given in accordance with applicable laws and regulations (Ramlan and Fristikawati, 2018).

Enforcement of laws and regulations on environmental law enforcement depends on the object in question or in dispute and the legal basis used is the Minerba Act, related to forestry, namely the Forestry Law coupled with the Law on Prevention and Destruction of Forests, and related to environmental protection, namely on the regulation of the PPLH Law . The environmental law enforcement apparatus in Indonesia itself is generally divided into 5 (five), namely the Police, Prosecutors, Judges, Legal Counsels, and Officers / Agencies authorized to give permission (Van Heeswijk and Turnhout, 2013).

Environmental law enforcementadministratively

Administrative law enforcement has a goal that is divided into two based on the nature of law enforcement, which is preventive. Administrative law enforcement aims to uphold all environmental legislation, the application of the enforcement of a law for activities involving licensing, environmental quality standards, environmental management plans, spatial planning and so forth. From these two administrative aspects of environmental law enforcement, in fact it has the main objective is to resolve administrative disputes arising from mining activities (Wollenberg and Kartodihardjo, 2010).
This administrative environmental law enforcement is inseparable from administrative disputes that occur, administrative disputes between mining entrepreneurs and the government are divided into 2 (two) forms, namely

administrative disputes due to administrative violations committed by mineral mining business people, and administrative disputes due to acts and / or the actions of officials or state administrative institutions (Atsar, 2019). The application of administrative sanctions as an effort to enforce environmental law administratively has an instrumental function, namely the control of illicit acts both by mining entrepreneurs and from the government for negligence (Wollenberg and Kartodihardjo, 2010).

This administrative dispute exists or arises because of administrative violations committed by mineral mining business actors against laws and regulations in the form of laws, government regulations, ministerial regulations and regional regulations that have governed the mechanism of mineral mining business activities.

Administrative law enforcement in mining activities refers to laws governing permits for activities, places to be carried out and the process of land clearing for mining activities. These laws include the Minerba Law, the Forestry Law, the PPLH Law and Law Number 18 of 2013 concerning the Prevention and Eradication of Forest Destruction, hereinafter referred to as the P3H Law (Abood et al., 2015). According to the Minerba Law, provisions regarding administrative disputes and administrative enforcement efforts on environmental law are contained in Article 151 to Article 157. Administrative sanctions for violations of those Articles may take the form of written warnings, temporary suspension of part or all of exploration or production operations; and / or revocation of IUP or IUPK depending on the business license granted to mining business people(Sari, 2012).

According to the Forestry Law, administrative environmental law enforcement is contained in Article 80 section (1) which explains that the holders of forest utilization permits that cause forest damage are obliged to pay compensation in accordance with the level of damage or consequences caused to the state, as rehabilitation costs, restoration of forest conditions, or other actions needed. The Forestry Law in providing administrative sanctions must first look at whether violators have violated other provisions outside of the criminal provisions set out in Article 78, if not then the imposition of criminal sanctions is preferred to replace all damage arising from activities carried out in forest areas (McCarthy, 2012).

According to the P3H Law, administrative law enforcement can be enforced if mining activities in a forest area are carried out without permission, then transporting and / or receiving deposits of mining products, as well as buying, marketing and / or managing mining products from such mining activities in accordance with Article sound 17 section (1) letters b, c, and e. Penalties obtained from administrative sanctions for activities violated above in the form of government coercion, forced money; and / or license revocation (Niyobuhungiro, 2019). According to the PPLH Law, administrative law enforcement in the PPLH Law is regulated in Article 76 section (2) through Article 82 section (2). These administrative sanctions take the form of written warnings, government coercion, freezing of environmental permits, or revocation of environmental permits. The four administrative sanctions are

imposed by the Minister, the Governor, or the Regent / Mayor if there is a violation of the environmental permit in the inspection carried out. The application and administration of these sanctions do not exempt the person in charge of the business from the responsibility of recovery and crime.

Imposition of sanctions above must be carried out in order in that article, with the intention of a written warning and government coercion to be applied first. After the government coercion was not carried out, then the freezing and revocation of the new environmental permit was applied. Government coercion referred to in Article 76 section (2) itself is explained in more detail in Article 80 section (1) letter a until g. The party responsible for a business and / or activity carried out in a forest area if it does not carry out government coercion as explained in Article 80 section (1) letters a until g, then it will be fined for any delay in the implementation of government coercive sanctions (Rizki et al., 2018).

If environmental pollution and / or damage have occurred, the Minister, governor, or regent / mayor may have the authority to force the person in charge of his business in the forest area to restore the environment. Moreover, if the business guarantor is unable to recover, the Minister, governor, or regent / mayor can appoint a third party to carry out environmental recovery, the burden of which is on the person to whom the responsibility is given.

Environmental law enforcement on crimes

There is no point in enforcing the rules of law if these rules cannot be imposed through administrative sanctions, therefore a law enforcement effort is needed in criminal environmental law enforcement. An effort to enforce the law (law enforcement) is through the imposition of criminal sanctions against violators considering that criminal sanctions bring legal consequences related to personal freedom (in the form of imprisonment, confinement and property in the form of imposition of objects) of the offenders concerned.

In the environmental offense that regulates pollutant acts and environmental pollution contained in Article 42 of the PPLH Law is a material offense that involves the preparation of evidence and the determination of a causal relationship between pollutant and polluted acts. Also, in Article 43 and 44 of the PPLH Law related to formal offense as a form of proof in the formulation of environmental offenses which later the role of the investigator on the results of investigations carried out against violations committed by the mining authority holder becomes a reference for giving criminal sanctions to be imposed on the polluter (McCarthy and Zen, 2010).

Investigation of environmental criminal acts carried out by legal subjects both personal and legal entities has been stipulated in Law No. 8 of 1981 concerning the Criminal Procedure Code (KUHAP). From the stages of handling criminal acts regulated in the Criminal Procedure Code shows that the investigation process carried out by investigators has the most important position in the process so that the process must be carried out correctly, professionally, proportionally and accountably (Wollenberg and

Kartodihardjo, 2010).

The criminal justice system outlined in the Criminal Procedure Code is an "integrated criminal and justice system", which has a law enforcement function including the act of investigation, arrest, detention, trial of a court of justice, conviction and carrying out a series of rehabilitation efforts. This aims to improve the convicted person who is very dependent on the results of police investigations, so that the investigation of environmental crimes is very specific (McCarthy, 2012).

Criminal law enforcement method in the Minerba Law is to provide criminal sanctions if every person who acts as the owner of a mining business commits a criminal offense specified in Article 158 to Article 165. Criminal law enforcement relating to mining activities can be carried out by providing sanctions in the form of prison and penalties that are imposed simultaneously. The sanctions consist of additional crimes if they violate the provisions of Article 164 in the form of confiscation of goods used in committing criminal acts, deprivation of profits derived from criminal acts, and / or the obligation to pay costs incurred due to criminal acts (McCarthy, 2012).

In environmental law enforcement, criminal law in the Minerba Act is more focused on violations committed in business licenses granted by the Minister or Regional Head (Governor or Regent / Mayor). Criminal environmental law enforcement in the Forestry Law is intended for everyone who uses illegal protected forest areas for mineral mining activities and is regulated in Article 78 section (6) which reads:

“Anyone who intentionally violates the provisions referred to in Article 38 section (4) or Article 50 (3) letter g, is threatened with a maximum imprisonment of 10 (ten) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah). (Barangsi apadengansenga jamel anggar keten tuanse bagaimana dimak suddalam Pasal 38 ayat (4) atauPasal 50 (3) huruf g, dianc amden ganpi dana penjara paling lama 10 (sepuluh) tahundandenda paling banyakRp. 5.000.000.000,00 (lima milyar rupiah).”(Van Heeswijk and Turnhout, 2013).

The provisions referred to in Article 38 paragraph (4) are that protected forest areas may not or are prohibited from conducting mining with an open mining pattern, and the provisions of Article 50 section (3) letter g are to conduct general investigation or exploration or exploitation of mining materials within forest area, without the minister's permission. Therefore, if it violates the regulation, it will be subject to sanctions in accordance with Article 78 section (6) as described above. According to the PPLH Law, criminal environmental law enforcement can be carried out in conjunction with administrative sanctions as stated in Article 78. In providing criminal sanctions, it can be imposed on business entities and / or people who give orders to commit these criminal acts and can also be given to the state officials which violates the policies in this PPLH Law.

For the application of sanctions imposed on individuals and business entities

when they have violated and resulted in exceedances of environmental damage standards, hazardous waste disposal and waste dumping without management, conducting mining businesses without having an environmental permit receive sanctions namely amdal and not imposing government coercion that has handed down to the perpetrators.Then, for criminal sanctions imposed on state officials is when they issue environmental permits without Amdal and also issue business licenses and / or activities without environmental permits.

Enforcement of environmental law on civil service

In civil law enforcement, it is necessary to distinguish between the application of civil law by the agency authorized to carry out environmental policies and the application of civil law to enforce compliance with environmental legislation.[38]The examples are that authorities may establish environmental protection requirements for the sale or granting of land clearing rights. ("Erfpacht') on a parcel of land, in addition there is the possibility of"short proceedings"(" kortgeding ") for third parties concerned to sue for compliance with laws and applications so that the prohibition or necessity is related to forced money ("injunction").

This enforcement usually arises as a result of the agreement stipulated in the contract between the mining entrepreneur and the government even with other parties outside the contract that has bound the two objects and also with the legal community. Civil disputes that can be disputed include agreements regarding the establishment of limited liability companies, mining service agreements, share purchase agreements, and others. Settlement of civil disputes can be carried out in court or out of court such as mediation, arbitration and reconciliation.[40] The way to resolve disputes under the Minerba Law, the Forestry Law and the PPLH Law occurs due to different things.

In addition, in the PPLH Law, environmental law enforcement occurs due to civil acts that violate the law in the form of pollution and / or environmental damage that causes harm to others or the environment in the form of compulsory compensation and / or certain actions. The particular action interpreted here is a form of effort by the violator to make a recovery. For the settlement of civil disputes through the Law on Prevention and Eradication of Forest Destruction, it does not regulate the settlement of civil disputes. This is because if it is seen from the regulations contained in this law, it is more or less the same as the arrangement for the granting of permits related to forest use in the Forestry Law. Based on this, the settlement of civil disputes will see the authority of dispute resolution in the Forestry Law (Wollenberg and Kartodihardjo, 2010).

CONCLUSION

Mineral mining business activities in protected forest areas should not be carried out in an open mining pattern as the mining method is carried out above or relatively close to the surface of the earth and in direct contact with air freely. This is in accordance with Article 38 section (4) of the Forestry Law. This is then reiterated in Article 5 section (1) letter b PP No. 24 of 2010, that mining activities can be carried out in protected forest areas are

underground mining patterns provided that they are prohibited from causing land subsidence, permanently changing the main functions of the forest area and damage to soil aquifers.

Enforcement of laws and regulations on environmental law enforcement depends on the object in question or dispute. The legal basis for environmental law enforcement for mineral mining activities in protected forest areas uses 4 (four) laws, namely the Minerba Act, the Forestry Act and the Forest Prevention and Destruction Act and the PPLH Law.

Ethical clearance

This study does not involve any participants in the survey, instead it is normative study with theoretical point of view. The present study was carried out in accordance with the research principles. This study implemented the basic principle ethics of respect, beneficence, non male ficence and justice.

CONFLICT OF INTEREST

The authors believe that there is no conflict of interest

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